

**Letter of Findings: 09-0692P
Sales and Use Tax
For the Year 2004 and 2005**

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ISSUE

I. Tax Administration – Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; [45 IAC 2.2-4-27](#); [45 IAC 15-11-2](#).

Taxpayer protests the imposition of the ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer rents, sells, and services construction and mining equipment to customers in Indiana. In 2009, pursuant to an audit, the Department of Revenue (the "Department") assessed sales tax because Taxpayer failed to collect the tax upon sales and/or leases of Taxpayer's equipment in 2004, 2005, 2006, and 2007. The Department's audit also assessed Taxpayer use tax on its purchases of certain tangible personal property for these years. The Department's audit, however, only assessed a negligence penalty for 2004 and 2005. Taxpayer paid the assessed taxes and interest, but requested that the Department abate the negligence penalty.

I. Tax Administration – Negligence Penalty.

DISCUSSION

After the audit, upon assessing sales tax and/or use tax, the Department's audit also imposed a negligence penalty for 2004 and 2005 tax years specifically because Taxpayer failed to collect sales tax on "damage waiver fees." In this instance, Taxpayer charged the lessees "damage waiver fees" in addition to the rental charges to cover the risk of loss concerning rental property. Since the "damage waiver fees" were associated with the rental property, the fees were the gross receipts from the rental property and, therefore, were subject to sales tax pursuant to [45 IAC 2.2-4-27](#).

Taxpayer agreed with the Department that it was responsible for those tax liabilities and timely paid the liabilities and interest. However, Taxpayer argued that its failure to collect sales tax and/or pay the use tax was not due to negligence and, therefore, Taxpayer requested the Department to abate the ten percent negligence penalty.

Pursuant to IC § 6-8.1-10-2.1, the Department may assess a ten (10) percent negligence penalty if the taxpayer:

- (1) fails to file a tax return;
- (2) fails to pay the full amount of tax shown on the tax return;
- (3) fails to remit in a timely manner the tax held in trust for Indiana (e.g., a sales tax); or
- (4) fails to pay a tax deficiency determined by the Department to be owed by a taxpayer.

[45 IAC 15-11-2](#)(b) further states:

"Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The Department may waive a negligence penalty as provided in [45 IAC 15-11-2](#)(c), in part, as follows:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

According to the Department's current audit, Taxpayer was audited previously. Notably, the previous audit assessed Taxpayer sales tax on "damage waiver fees," which was exactly the same issue in this current audit. Thus, Taxpayer was on notice that, as an agent for the State of Indiana, it should have collected the sales tax on the charges of the "damage waiver fees" but Taxpayer failed to do so accordingly.

Taxpayer requested the Department to abate the negligence penalty assessed by this current audit. Taxpayer, however, did not provide any documentation establishing that its failure to remit in a timely manner the tax held in trust for Indiana was due to reasonable cause and not due to negligence. Given the facts mentioned above, the Department is not able to agree with Taxpayer that its failure was not due to negligence. Therefore, Taxpayer's protest on the imposition of negligence penalty is respectfully denied.

FINDING

Taxpayer's protest on the imposition of negligence penalty is respectfully denied.

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